Supreme Court, U.S.
FILED
MAR 28 1995

No. 94-1456

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,

Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN G. CHURCHWELL
Counsel of Record
DANIEL E. MUALLEM
Fair Political Practices
Commission
428 J Street, Suite 800
Sacramento, CA 95814
(916) 322-5901
Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a statute that prohibits anonymous mass mailings by candidates violates the First Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

LIST OF APPENDICES v

I. STATEMENT OF THE CASE 2

II. REASONS FOR DENYING THE PETITION 4

A. Section 84305 is Narrowly Tailored 5

B. Not One of the "Questions Presented" in the Petition Was Addressed By the Court Below 5

C. The Procedural Posture and Factual Record of the Present Case Hinder a Broader Review of Section 84305 7

D. The *McIntyre* Case Presents the First Amendment Issues Associated with Speaker Identification Laws 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Page(s)

Anderson v. Celebrezze, 460 U.S. 780 (1983) 9

Bemis Pentecostal Church v. State, 731 S.W.2d 897 (Tenn. 1987) 9

Buckley v. Valeo, 424 U.S. 1 (1976) 8

Griset v. Fair Political Practices Comm'n, 884 P. 2d 116 (Cal. 1994) 6, 7

Illinois v. Gates, 462 U.S. 213 (1983) 7

KVUE, Inc. v. Moore, 709 F.2d 922 (5th Cir. 1983), aff'd 465 U.S. 1092 (1984) 9

McIntyre v. Ohio Elections Commission, 618 N.E.2d 152 (Ohio 1993), *cert. granted* 114 S.Ct. 1047 (1994) . . .8, 9

Youakim v. Miller, 425 U.S. 231 (1976) 6

TABLE OF AUTHORITIES cont'd

Cases

Page(s)

State Statutes

California Government Code

§ 1094.5 (b) 7
§ 82007 . . . . . .5, 8
§ 82013 . . . . . .5, 8
§ 82041.5 . . . . . .2, 5
§ 84305 . . . . . .passim

2 California Code of Regulations
§ 18435(a) 2

Arizona Revised Statutes
§ 16-912 5

Massachussetts General Laws
ch. 56, § 39 5

Miscellaneous

Sup. Ct. R. 14.1(a) 6

LIST OF APPENDICES

Page

APPENDIX A A.1

APPENDIX B B.1

No. 94-1456

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,

Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Fair Political Practices Commission respectfully requests that the Court deny the petition for a writ of certiorari filed by Daniel Griset, Griset Campaign Committee, and Santa Ana Progress Committee ("Petitioners"). The California statute is constitutional, the three issues raised by Petitioners were not addressed by the California Supreme Court, and every important constitutional issue associated with election-related speaker identification statutes is already before the Court in *McIntyre v. Ohio Elections Commission* (No. 93-986).

I.
STATEMENT OF THE CASE

Petitioner Daniel Griset was an incumbent local councilmember in Santa Ana, California, running for reelection in 1988. In the month before the election, Petitioners Griset and campaign committees controlled by him, the Santa Ana Progress Committee and the Griset Campaign Committee, sent five separate mass mailings[1] that failed to identify candidate Griset as the true sender in accordance with the requirements of California Government Code Section 84305.[2]

Four of the five "smear" or "hit" pieces were produced and sent by a commercial direct mail firm at the direction of Petitioners. These four mailings, entitled "Meet the Real Rick Norton," "Swap Meet," "The Seven Lies Swap Meet Owner Rick Norton Wants You to Believe," and "Beware of Tricksters," each identified the Santa Ana Progress Committee as the sender, but failed to include the required reference to controlling candidate Daniel Griset. Each of the four mass mailings was mailed to 29,000 households in the City of Santa Ana.

The fifth mailer was produced and sent by the Griset Campaign Committee and targeted approximately 300 police officers who worked for the City of Santa Ana. This piece listed

---

[1] A "'mass mailing' has been made when over two hundred substantially similar pieces of mail have been sent within a calendar month." 2 Cal. Code Regs. § 18435(a). Excluded are form letters and other mail sent in response to an unsolicited request, letter, or other inquiry. Cal. Gov't Code § 82041.5 (set forth in Petitioner's Appendix F, page 2).

[2] The regulation that implements Section 84305 (2 Cal. Code Regs. § 18435) is reprinted in Appendix B.

the sender as the "Washington Square Neighborhood Association," when in fact it was Griset.

In March 1990, Respondent filed an administrative enforcement proceeding against Petitioners. It alleged that Petitioners had violated Section 84305 by failing to identify candidate Daniel Griset on the envelope return address as the sender. Petitioners sought to enjoin the enforcement of Section 84305 against them on constitutional grounds in Orange County Superior Court in an action for declaratory and injunctive relief. The trial court denied Petitioners' motion for a preliminary injunction, and the administrative enforcement action proceeded to hearing before an administrative law judge. Upon stipulated facts, the administrative law judge found that Petitioners had committed five separate violations of Section 84305. He then imposed a fine of two thousand dollars ($2,000) per violation.

Petitioners thereafter amended their action in Orange County Superior Court to add a cause of action for a writ of administrative mandamus, arguing that the application of Section 84305 to them was unconstitutional under the First and Fourteenth Amendments. Petitioners then filed simultaneous motions for: (1) issuance of a peremptory writ on the mandamus cause of action; and (2) summary judgment on the declaratory and injunctive relief counts. The trial court issued separate orders denying the petition for a writ of mandate and denying the motion for summary judgment. Petitioners appealed only from the denial of the writ of administrative mandamus.

The California Court of Appeal upheld the trial court's denial of the writ, holding that Section 84305 was constitutionally valid as applied to Petitioners. The court also examined Section 84305 for overbreadth in its application to non-candidate controlled committees, and found that its application to such committees

was constitutionally invalid. The court then placed a limiting construction on Section 84305 to save the statute from the perceived infirmity.

The California Supreme Court, in a 7-0 opinion, held that Section 84305 is not unconstitutional as applied to candidates and their controlled committees, including Petitioners. It did not reach any other issue.

II.
REASONS FOR DENYING THE PETITION

Election-related speaker identification statutes serve the important governmental purpose of providing voters with critical information before they vote. These laws potentially implicate the First Amendment rights of free speech and association, however, because some speakers may wish to remain anonymous.

It would be impracticable for the Court to review, for constitutional infirmity, the statutes of each of the forty-nine states[3] that regulate in this area. Thus, the question is whether the present case qualifies for the Court's discretionary review, given: (1) the unique language of the California statute, (2) the narrow scope of the California Supreme Court's unanimous decision, and (3) the case's procedural posture. When these criteria are examined, against a backdrop of speaker identification issues that may warrant review by the Court, it is obvious that the Court should deny the present petition.

---

[3] Appendix "A" cites the laws of the states that have speaker identification requirements for elections. The statutory provisions of the federal government and the District of Columbia also are listed.

A.
Section 84305 is Narrowly Tailored

The California statute (Cal. Gov't Code § 84305) is not a representative speaker identification statute. In fact, it is the most narrowly-tailored such law in the nation. It regulates only candidates and political committees.[4] Second, it regulates not all speech, but only the mass mailings of such candidates and committees.[5] Third, it is content neutral, allowing the electorate to know who sponsors a mailing, irrespective of whether it contains malicious lies, innuendo, or the truth. Finally, the required disclosure is simply the name and address of the candidate or committee, which is public information as soon as the candidate files for the office, or the committee files its first campaign statement.

B.
Not One of the "Questions Presented" in the Petition Was Addressed By the Court Below

None of the three, broad issues that Petitioners are asking the Court to accept for review was examined by the California

---

[4] Cal. Gov't Code §§ 82007, 82013 (set forth in Petitioner's Appendix F, page 1.) Arizona's sender identification law also is limited in scope to candidates and political committees, but the law applies to all "campaign literature or advertisements" that contain solicitations or express advocacy. (Ariz. Rev. Stat. Ann. § 16-912 (West Supp. 1994).)

[5] Cal. Gov't Code § 82041.5 (set forth in Petitioner's Appendix F, page 2). Massachusetts regulates only election-related advertisements in newspapers and other periodicals, but it applies to all "person[s]." (Mass. Gen. Laws Ann. ch. 56, § 39 (Law. Co-0p. 1990).)

Supreme Court. Ordinarily, this Court does not decide questions not dealt with by the lower court. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). In the decision below, the unanimous California Supreme Court stated that the:

> "[P]recise question that confronts us [is] whether a statute that prohibits anonymous mass mailings by candidates or candidate-controlled committees in political campaigns violates the First Amendment ...." *Griset v. Fair Political Practices Comm'n*, 884 P. 2d 116, 119 (Cal. 1994).

Astonishingly, this issue is not even listed by Petitioners in the "Questions Presented" Section of their petition, and apparently, Petitioners have waived it. Sup. Ct. R. 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court").[6]

Petitioners have abandoned the mundane issue whether the administrative fine levied against them was legal, for the bright lights of a constitutional facial challenge. Petitioners ask the Court to do the following: (1) review the facial validity of Section 84305; (2) *if* the Court decides that Section 84305 is unconstitutional as applied to parties not before the Court (non-candidates), *then* to decide whether it is constitutional as applied to candidates; and (3) *if* the Court rules on the first part of Question Number 2 pertaining to parties not before the Court, *then* to review Section 84305 for any overbreadth problems.

---

[6] Although the second issue presented by Petitioners contains a reference to an "as applied" challenge with regard to candidates, it is conditional upon the court first reaching issues concerning non-candidates. We believe that this does not meet the "fairly included" test.

These issues were not considered by the California Supreme Court. It simply found that Section 84305 was constitutional as applied to Petitioners and other candidates and candidate-controlled committees. This Court's inquiry should be no broader.

C.
The Procedural Posture and Factual Record of the Present Case Hinder A Broader Review of Section 84305

Petitioners chose not to appeal the trial court's judgment denying their declaratory relief cause of action, choosing instead to rely entirely on their appeal of the trial court's denial of their petition for a writ of administrative mandamus. Under California law, administrative mandamus limits judicial review to a limited number of specified issues. Cal. Code Civ. Proc. § 1094.5(b) (West Supp. 1995).

The California Supreme Court, noting that Petitioners' appeal was limited to the denial of the writ petition, did not reach Petitioners' overbreadth claims. *Griset v. Fair Political Practices Comm'n,* 884 P. 2d at 118. This Court also should reject Petitioners' facial challenge to Section 84305. Jurisdictional and prudential considerations weigh heavily against granting certiorari when the claim upon which the petition is based relies entirely on a law's theoretical impact on parties not before the court. *See generally Illinois v. Gates*, 462 U.S. 213, 217-225 (1983) (granting certiorari only when issue was decided by the state court of last resort guarantees adequate factual record, and discourages the framing of broad rules, seemingly sensible on one set of facts, but which prove ill-considered in other circumstances).

D.
The McIntyre Case Presents the First Amendment Issues Associated With Speaker Identification Laws

There are three issues that arguably could form the basis for certiorari in a lawsuit involving an election-related speaker identification statute. First, the Court could examine the scope of the right to anonymity in the context of elections. As stated above, Section 84305 is the most narrowly-tailored such law in the country. Unless this Court is of the opinion that *no* such law is valid, no matter how narrowly drawn, the California statute passes constitutional muster under the strict scrutiny test. In the unlikely event that the Court feels that the right to anonymity is absolute, such a sweeping pronouncement can be made in *McIntyre v. Ohio Elections Commission*, 618 N.E.2d 152 (Ohio 1993), *cert. granted* 114 S.Ct. 1047 (1994). It would seem inefficacious to review the California case merely to proclaim such an unequivocal holding twice in the same term.

A related issue is whether some type of monetary or other threshold is required before a state may mandate that a person identify himself or herself in connection with an election-related communication. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976). California has such thresholds, because the "sender" must already be a candidate or political committee[7] in order to be

---

[7] Both "recipient" and "independent expenditure" committees currently have a qualifications threshold of $1,000 per calendar year, while a "major donor" committee has a threshold of $10,000 per calendar year. A "candidate" is defined by the act of running for office and receiving or spending any amount of money for that purpose. The California statutory definitions of these terms (Cal. Gov't Code §§ 82007, 82013) are set forth in Appendix F, page 1 of the Petition.

subject to the law. Many other states have chosen to regulate a broader class of speakers. Once again, the Court can address this issue in *McIntyre* without any need to accept another case.

Finally, there may be some question as to the proper standard of review in these cases. It certainly is *not* an issue in the instant case, as both parties agree that strict scrutiny is applicable and that is the test that the unanimous California Supreme Court applied. Moreover, almost every court reviewing a speaker identification statute has applied strict scrutiny.[8] A notable exception is the majority opinion of the Ohio Supreme Court in *McIntyre,* which applied the relaxed "legitimate state interest" test. *McIntyre v. Ohio Elections Commission*, 618 N.E.2d at 155-56. The *McIntyre* decision of this Court should settle the standard of review issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: March 27, 1995

Respectfully submitted,

STEVEN G. CHURCHWELL
Counsel of Record
DANIEL E. MUALLEM
Attorneys for Respondents

---

[8] *See, e.g., Bemis Pentecostal Church v. State,* 731 S.W.2d 897, 903 (Tenn. 1987), *appeal dismissed,* 485 U.S. 930 (1988); *cf. KVUE, Inc. v. Moore,* 709 F.2d 922, 937 (5th Cir. 1983), aff'd 465 U.S. 1092 (1984) (applying balancing test of *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).